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IN THE

Supreme Court of the United States

October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.

Petitioner,

v.

DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF THE LINCOLN CENTER FOR LEGAL STUDIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Georgia Supreme Court's decision directly conflicts with this Court's *McKesson* standard of "procedural safeguards" which necessarily include fair notice.

2. Whether requiring an impoverished taxpayer to pay a tax before he may obtain judicial review of that tax violates fundamental principles of administrative law and would lead to increased and unreviewable, arbitrary conduct by tax collecting agencies.

3. Whether a state law which forces a taxpayer to submit to a tax sale a mortgaged property in order to prepay the tax to qualify for a judicial appeal deprives the taxpayer of the "clear and certain remedy" required by *McKesson*.

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BRIEF OF THE LINCOLN CENTER FOR LEGAL STUDIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Lincoln Center for Legal Studies, Inc., submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the Georgia Supreme Court filed by the Constructivist Foundation. The petitioner and respondent have consented to the filing of the brief. Their consent letters have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Lincoln Center for Legal Studies, Inc., is a non-profit, educational corporation incorporated in 1974 in the District of Columbia for the pur-

poses of providing legal education and promoting the improvement of, and public understanding of, the Anglo-American legal system. The Internal Revenue Service has ruled that the corporation is tax-exempt and that donors may treat their contributions thereto as tax-deductible.

The Lincoln Center has sponsored and administered seminars and "continuing legal education" programs, sponsored research and writing, and collaborated with such accredited law schools as Indiana and Delaware Law School in administering semester-long legal education programs for law students in Washington Intern programs. The Lincoln Center has no endowment or other source of regular income; it relies exclusively on contractual fees, foundation grants, and private donor support. To reduce overhead, the corporation has relocated to northern Virginia. During the present recession, contributions have dried up. In terms of financial resources, the corporation's position is similar to that of Petitioner: it is impoverished.

The interest of the Amicus is two-fold. First, this case falls squarely within the Lincoln Center's corporate purpose -- to improve the legal system in the United States. Maintaining and improving the fairness of the legal system is central to improving the system as a whole. The issue whether impoverished persons or entities must pay a challenged tax before they may have a judicial determination whether that tax was properly assessed is fraught with questions of fairness. This case presents an opportunity to refine constitutional notions of fairness, and thus substantially to contribute to the jurisprudence of Due Process and "Equal Justice Under Law."

Second, as a practical matter, the Lincoln

Center is among those hundreds of small non-profit corporations which lack resources to pay any significant tax. Should this Court allow the State of Georgia's ruling, adverse to the Constructivist Foundation, to stand, there is a real possibility that the District of Columbia could impose additional taxes on non-profits such as this Amicus. Unlike some jurisdictions, the District of Columbia does not permit waiver for lack of funds to pay before judicial challenge. The District, as most other jurisdictions, is desperately searching for additional revenue for its strained budget during the recession. If waiver of prepayment of a contested tax by impoverished non-profits does not become the universal rule, the Lincoln Center could well become the next victim of taxing authorities demanding funds from groups which have none.

INTRODUCTION AND SUMMARY

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S.Ct. 2238 (1990), this Court ruled that a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. The Court also held that when a state penalizes taxpayers for failure to remit taxes in a timely fashion, thus requiring them to pay first before obtaining judicial review of the tax's validity, federal due process principles require that postdeprivation procedure provide "clear and certain remedy" of deprivation of tax moneys in an unconstitutional manner.

In the present case, the Georgia courts have failed to meet Due Process requirements by failing to provide Petitioner Constructivist Foundation with reasonable and adequate notice of the hear-

ing in the judicial appeal of the administrative tax proceedings, and by insisting that Petitioner, a non-profit charitable corporation, comply with the State of Georgia requirement of prepayment of tax assessment before judicial hearing on the merits of that assessment. Whether or not valid on its face, this prepayment requirement, as applied to an impoverished individual or nonprofit corporation, renders the Due Process right of judicial review a hollow promise devoid of practical meaning.

First, the aggrieved impoverished taxpayer is caught in a "Catch-22" situation: it cannot pay the tax it challenges; yet it cannot obtain judicial determination whether its challenge is valid until it pays.

Second, the requirement of prepayment effectively excludes from the protection of judicial review of a challenged tax the very class of persons, the poor, who most need judicial protection. By closing the door to the protections available through judicial review, the State of Georgia effectively establishes the County Board of Equalization, an administrative agency, as final arbiter both of (a) the propriety of imposing a tax on a nonprofit corporation at all, and of (b) the justification of the amount of the tax. To constitute an administrative tax-collecting body as sole judge of the propriety of its own actions is not consonant with the jurisprudence of American law in general and with a long history of constitutional law/administrative law cases requiring Court oversight of agencies.

Third, in the instant case, the postpayment retroactive remedy, viz., the possibility of recovering a prepaid tax when a court later rules that tax

invalid as applied to the taxpayer, is not adequate in this case. If the property to be taxed is sold at a tax sale, the mortgagee can accelerate the loan on the property and require full payment. Should payment not be made -- and clearly in this case the poverty of the mortgagor nonprofit corporation would preclude paying the loan in one lump sum -- the mortgagee can use the tax sale to recoup some or all of its loan. If later, a court determines the tax invalid, as the Petitioner urges, and orders reimbursement of the collected tax, the court cannot order the mortgagee to reinstate the loan.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for several reasons. First, the Supreme Court of Georgia's affirming, without opinion, the Superior Court dismissal of Petitioner's tax appeal, amounts to an endorsement of a State tax assessment method which, as applied to Petitioners in this case, offends the Due Process Clause of the federal Constitution. The issue of fairness to profit-making businesses where a taxpayer challenges a tax was squarely before this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S.Ct. 2238 (1990), only two years ago. That case ruled that a State must provide "procedural safeguards" against unlawful tax exaction because such tax is a deprivation of property under the Due Process Clause. *A fortiori*, non-profit corporations are due the same "procedural safeguards." But in this case, the aggrieved nonprofit taxpayer did not enjoy such safeguards. And Due Process defects are not cured by the State Supreme Court's affirming the defective process without explanation, although Petitioner specifically requested an opinion in

order to clarify the issues for appeal to this Court.

Second, if the decision below is allowed to stand, it will support the proposition that administrative bodies may shelter their decisions from judicial scrutiny by the simple expedient of requiring the party aggrieved by those decisions to pay not merely a filing fee or bond but the full exaction the agency decision imposed. In the case of arguably illegal taxes, the tax collector's *de facto* autonomy is particularly fraught with potential for abuse. Under American administrative law principles, the final arbiter of complaints about an agency's action cannot be that agency itself. It must be the appropriate Court.

Third, the possibility of postpayment, retroactive remedy, viz., recovering the prepaid tax when a court later upholds the taxpayer's challenge to the tax, does not, in this case, meet the *McKesson* requirement of a "clear and certain remedy" for unconstitutional deprivation of tax moneys [emphasis added]. An impoverished taxpayer must suffer the forced sale of the property, with certainty that his mortgagee will foreclose to recoup its loan. Whether a forced sale generates enough funds to pay the tax, one cannot anticipate whether it will also pay off the mortgage; in any event, the one-year-right-of-buy-back from the purchaser at a forced tax sale does not mandate that the mortgagee reinstate the loan. Thus the tax sale, which might prove to have been invalid, will trigger foreclosure and loss of the property.

A. The Georgia Supreme Court's Decision Directly Conflicts With This Court's *McKesson* Standard of "Procedural Safeguards" Which Necessarily Include Fair Notice.

In *McKesson Corp., supra*, this Court ruled that

a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause. "Procedural safeguards" necessarily import reasonable or adequate notice. But the Georgia State taxing authorities relied on their local Court's notice-by-local-publication in Georgia when they knew that Petitioner Constructivist Foundation has its offices in Maryland. When the stakes are the possible deprivation of property variously valued between $750,000 and almost $1.5 million, notice by publication in the DeKalb town paper was procedurally far from sufficient to permit Petitioner, located hundreds of miles away, knowledge of an hearing in Petitioner's suit appealing the administrative tax proceedings.

The local Superior Court, fully aware of Petitioner's earlier objections to the tax because of its appeals of prior assessments, cannot reasonably conclude that it had no obligation, stemming from Due Process considerations of fairness, to make sure that Petitioner obtained its "day in Court." There is no "procedural safeguard" of a taxpayer's right to contest unlawful taxes when the local Court collaborates with the tax collector in doing no more than run a small newspaper notice in a paper hundreds of miles from the taxpayer. Such a "safeguard" does not make the taxpayer safe; it is not the process that is "due" when one stands to lose substantial property.

A "notice" which is known not to notify is just a trick, used to disguise this local government's unilateral confiscation of out-of-State person's property with the cosmetic appearance of propriety. It is not Due Process.

B. Requiring an Impoverished Taxpayer to Pay a Tax Before He May Obtain Judicial Review of that Tax Violates Fundamental Principles of Administrative Law and Would Lead to Increased and Unreviewable Arbitrary Conduct By Tax Collecting Agencies

The primary rationalization of the State's position is the Petitioner's failure to prepay the contested tax, as a precondition of being admitted to Court to contest the tax. *McKesson* permitted this approach where adequate postpayment reimbursement remedies existed, for those taxpayers who, having prepaid the contested tax, later prevailed in court.

However, *McKesson* did not address the issue whether this approach violates fundamental principles of administrative law in the case where a non-profit taxpayer cannot, because of poverty, prepay the tax. Yet, upon scrutiny it is clear that to require the taxpayer to pay whatever tax the tax-assessment agency wishes to impose, before he may obtain independent review of the rightfulness of that tax, is to give the taxing agency *carte blanche* to do what it wants and, indeed, to encourage it to be even more arbitrary. In the present case, the tax collector has determined, in the face of the Petitioner's nonprofit status and impoverished condition, that (a) it has the right to collect the tax just as if the taxpayer were a profit-making entity; (b) that the valuation of the property is roughly $1,500,000, even though the taxpayer has an independent appraisal of $750,000; and (c) the correct tax, for certain years in question, totals approximately $75,000. These determinations the taxpayer argues are arbitrary and improper. But the State's position is that the

taxpayer may obtain an independent review, by a court, of its tax-collecting agency's decisions only if it first pays the tax.

Under American administrative/constitutional law principles, the final arbiter of an agency's asserted arbitrary conduct cannot be that agency itself. It must be a court. The United States Supreme Court has repeatedly emphasized with regard to fundamental rights that judicial action possesses a degree of security superior to administrative action. 1 Am.Jur. 2d *Administrative Law* Section 17 (1964). Particularly with regard to the constitutional rights of persons, the judicial process aims to provide security and safeguards where expediency is served by the expertise and absence of rigidity of the administrative process. Id. at Section 19. Also see, Id. at Section 16.

The blatant abuses allowed by the Georgia tax appeal system will become obvious if we recast the facts slightly and assume that the taxpayer could pay the $75,000, but that this amount were the absolute limit it could pay. Then, at least on the face of it, the evil of conditioning access to the courts on the aggrieved party's ability to pay would be less apparent. But all the taxing agency need do, then, to avoid judicial review of its self-declared power to tax non-profit entities would be to raise the tax due even more by using a self-invented valuation far above private appraisals. The tax collector need only set the valuation so high that the taxpayer could not pay the proportioned tax, and it would have effectively kept the taxpayer from judicial review of the abuses.

In other words, the more arbitrary the tax collection agency became, the less likely would it be that a court could review its arbitrariness! If this

Court upholds the Georgia Supreme Court by denying certiorari, it will, in effect, be creating an incentive for administrative agencies throughout the United States, particularly tax collectors, to be more arbitrary, rather than less. Yet preventing governmental arbitrariness in dealing with its citizens, especially when it takes their property -- as taxation does -- is perhaps the essence of due process.

The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings. *Galvan v. Press*, 347 U.S. 522 (1953). But a system which rewards increased arbitrariness with decreased judicial review guarantees administrative independence from the very courts charged with insuring due process in administrative proceedings. In such a situation, due process protection through judicial review is purely illusory.

The taxing agency becomes a law unto itself. The Georgia Supreme Court endorsed (without opinion although specifically requested by Petitioner to provide one in order to clarify the issues for appeal to this Court) procedures which permit the denial to the impoverished taxpayer of a judicial forum in which to challenge those procedures on due process grounds. This denial is achieved by a simple expedient: the tax collector makes the procedure so unfair and its result -- a grossly inflated tax based on a grossly inflated and arbitrary valuation -- so onerous that the impoverished taxpayer has no way to pay the tax so that he can "buy" his way into court to challenge it.

This tax appeal procedure enables the tax collector to prevent an aggrieved taxpayer from chal-

lenging a tax as unfair. It does this by encouraging the tax collector to increase its unfairness to a point beyond the taxpayer's financial ability to enter court to challenge that unfairness. The tax collector simply calculates the taxpayer's ability to pay and then sets the tax well above it. The more unfair the procedure becomes, the less able is the taxpayer to challenge its unfairness! This is just the opposite of Due Process.

C. Where State Law Forces a Taxpayer to Submit to a Tax Sale of a Mortgaged Property In Order To Prepay the Tax Such Procedure Deprives the Taxpayer of the "Clear and Certain Remedy" Required by *McKesson*.

In this case, the Constructivist Foundation lacks the assets to pay the taxes due of over $75,000 on a property variously estimated to be worth $750,000 to $1,500,000. Since the post-tax-collection remedy of repayment can be mandated only by a court finding the tax improper, and since the Petitioner can get into court only by paying the tax, the Georgia procedure in effect requires the taxpayer to submit to a forced tax sale and a consequential mortgage foreclosure.

Such tax sale will only compound, not remedy, the taxpayer's problems -- and render the "clear and certain remedy" all the more chimerical. Consider the possible scenarios:

(i) The tax sale will not bring enough money to pay the full tax allegedly owing. In this case the State takes what it can get and the property owner is left with nothing. Since the full payment has not been made, the precondition of tax payment permitting judicial review of the tax has not been met: taxpayer has no judicial remedy.

He is deprived of his property without Due Process of Law. Even if the tax were blatantly unconstitutional, the taxpayer will not obtain a judicial determination of that claim.

(ii) The tax sale will bring enough money to pay the tax allegedly owing. But to protect its interest, the mortgagee accelerates the loan and demands full payment of the mortgage. Lacking funds to pay even the tax, *a fortiori* the taxpayer cannot also pay the mortgage. The taxpayer defaults. The mortgagee and the taxing authority sell the property; the mortgagee takes whatever is left after the taxing body gets its tax. All equity, which is "property," the taxpayer had in the real estate is lost.

In these two scenarios, the possibility of retroactive repayment of an improperly prepaid tax is a "remedy" without substance. The taxpayer will lose the property even if, should the tax be fully paid through the sale, he eventually gets into to court and proves the tax improper. He may recover the tax but he will lose the asset. Thus he might recover, at best, five to ten percent of the market value of the asset while losing his equity worth many times more than the taxes. Such a Pyhrric victory is no real remedy at all, much less a "clear and certain one" as required for due process protection.

CONCLUSION

For these reasons, as well as the reasons set out in the Constructivist Foundation's Petition, this Court should grant certiorari.

Respectfully submitted,

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